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in the Supreme Court of the United States

OCTOBER TERM, 1976

NO. 75-1414

DONNELLY ADVERTISING CORPORATION OF FLORIDA and EMPIRE INDUSTRIES CORPORATION,

Petitioners,

vs.

CITY OF MIAMI, ET AL., ETC.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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MIAMI REVIEW — 371-4853 — 377-3721

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioners, Donnelly Advertising Corporation of Florida, a Florida corporation and Empire Industries Corporation, a Florida corporation, pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the Fifth Circuit, rendered in these proceedings on January 7, 1976.

BLEED THROUGH

OPINIONS BELOW

The opinion of the United States Court of Appeal for the Fifth Circuit is unreported, and appears in Appendix A, *infra*, pp. App. 1. The Opinion of the United States District Court for the Southern District of Florida has not been reported. A copy of that decision appears in Appendix B, *infra*, pp. App. 2-6.

JURISDICTION

The order and judgment of the United States Court of Appeals for the Fifth Circuit was entered January 7, 1976. See Appendix A, p. App. 1, *infra*. This Petition for a writ of certiorari was filed within 90 days of said date. The jurisdiction of this Court is invoked under 28 USC §1254(1).

QUESTIONS PRESENTED

The Petitioners are engaged in the selling and leasing of advertising space on outdoor advertising signs within the City of Miami, Florida. The City of Miami amended its Comprehensive Zoning Ordinance to prohibit outdoor advertising signs in areas zoned C-2 and W-1. As a result of this amendment, a large portion of the Petitioners' signs within the City of Miami were declared illegal non-conforming uses.

A five-year amortization period was provided by the ordinance, however, when the amortization period expired, the Petitioners were tried and found guilty in Municipal Court of violating the ordinance. The Municipal Court's verdict was affirmed on appeal.

In 1974, the Petitioners filed an action for declaratory and injunctive relief challenging the constitutionality of the City of Miami Outdoor Advertising Ordinance. The District Court dismissed the Complaint on the basis that the prior State Court convictions were res judicata and barred the action in Federal Court.

After denying oral argument, the Court of Appeal affirmed the lower Court without opinion.

The questions presented are:

1. Whether the local rules of the Fifth Circuit Court of Appeals which allow the Court to decide a case without oral argument and affirm a lower Court's decision without opinion violate the due process clause of the Fourteenth Amendment to the United States Constitution.

2. Whether a trial Court, when ruling on a motion to dismiss pursuant to Rule 12(b), *Federal Rules of Civil Procedure*, may accept uncertified and incomplete copies of a State Court proceeding attached to the motion, and base its ruling upon that evidence, without notifying the opposing party that the motion shall be treated as a summary judgment and disposed of as provided in Rule 56, *F.R.C.P.*

3. Whether a party is estopped from later litigating constitutional issues in Federal Court when the record of the prior State Court's proceeding does not specifically set forth those issues which had been raised and determined by the State Court.

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CONSTITUTIONAL PROVISIONS INVOLVED

Amendment XIV: Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULES OF CIVIL PROCEDURE INVOLVED

Rule 12(b): Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: (1) lack of jurisdiction over the subject matter, (2) lack of jurisdiction over the person, (3) improper venue, (4) insufficiency of process, (5) insufficiency of service of process, (6) failure to state a claim upon which relief can be granted, (7) failure to join a party under Rule 19. A motion making any of these defenses shall be made before pleading if a further pleading is permitted. No defense or objection is waived by being joined with one or more defenses or objections in a responsive pleading or motion. If a pleading sets forth a claim for relief to which the adverse party is not required to serve a responsive pleading, he may assert at the

trial any defense in law or fact to that claim for relief. If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

FIFTH CIRCUIT COURT OF APPEALS LOCAL RULES INVOLVED

RULE 18, SUMMARY CALENDAR

(a) Whenever the court, sua sponte or on suggestion of a party, concludes that a case is of such character as not to justify oral argument, the case may be placed on the summary calendar.

(b) A separate summary calendar will be maintained for those cases to be considered without oral argument. Cases will be placed on the summary calendar by the clerk, pursuant to directions from the court.

(c) Notice in writing shall be given to the parties or their counsel of the transfer of the case to the summary calendar.

See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5 Cir., 1970, 431 F.2d 209.

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RULE 21, AFFIRMANCE WITHOUT OPINION

When the court determines that any one or more of the following circumstances exists and is dispositive of a matter submitted to the court for decision: (1) that a judgment of the district court is based on findings of fact which are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) that no error of law appears; and the court also determines that an opinion would have no precedential value, the judgment or order may be affirmed or enforced without opinion.

In such case, the court may in its discretion enter either of the following orders: "AFFIRMED. See Local Rule 21," or "ENFORCED. See Local Rule 21."

STATEMENT OF THE CASE

The Petitioners filed, in the United States District Court for the Southern District of Florida, a Complaint for Injunction and Declaratory Relief. The gravaman of the Petitioner's Complaint was the assertion that the City of Miami Ordinance Prohibiting Outdoor Advertising in certain locations was unconstitutional.

The Respondents moved to dismiss the Complaint on several grounds; however, res judicata was not among the grounds raised at that time. The Respondents later filed a second Memorandum of Law raising the issue of abstention. Again, res judicata was not raised as a defense.

Finally, the Respondents filed a third Memorandum of Law raising the issues of res judicata. With their Memorandum of Law, the Respondents attached certain uncertified and incomplete copies of proceedings and briefs filed in State and Municipal Courts. The Petitioners objected to this evidence as presented and alleged that it should not be considered at that time.

The trial Court granted the Respondent's Motion to Dismiss and relied completely upon the documents which had been filed with the Respondent's third Memorandum of Law. The trial Court ruled that the Petitioners were estopped from litigating in Federal Court since they had previously litigated in State Court. The Petitioners contended that the State Courts did not meet or decide the Constitutional questions raised and therefore they were not prohibited from bringing this action in Federal Court. The Petitioners requested a re-hearing on the matter and oral argument. Both requests were denied.

On appeal to the Fifth Circuit Court of Appeals, the Court placed the case on summary calendar and denied oral argument. Immediately after the case was placed on summary calendar, the Fifth Circuit affirmed the trial Court without opinion.

REASONS FOR GRANTING THE WRIT

1. The Court below has so far departed from the accepted and usual course of judicial proceedings as to call for the exercise of this Court's power of supervision.

The Fifth Circuit Court of Appeals has adopted local rules allowing the Court, in its discretion, to deny litigants

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the right to an oral argument on appeal or an opinion when the lower Court's decision is affirmed. These rules have the effect of denying a litigant the right to a meaningful appeal. Such a denial is in violation of the due process and equal protection clause of the Fourteenth Amendment to the United States Constitution. A litigant in Federal District Court has been granted an appeal from all final judgments as a matter of right. 28 *USC* §1291.

Nevertheless, an appellate procedure which denies the litigant the open and equal access to the Courts violates the provisions of the United States Constitution. *Rinaldi v. Yeager*, 384 US 305; *North Carolina v. Pearce*, 395 US 711; *Mayer v. Chicago*, 404 US 189. Once the government has conferred the right to appeal, such appeal should be meaningful.

The right of a litigant to present his case in oral argument is left to the complete discretion of the Court. This allows the Appellate Court to arbitrarily classify certain appeals for summary treatment, thereby denying them the opportunity and procedures granted to other litigants. Such a denial of equal protection of the law must not stand.

The Petitioners would also contend that all litigants are entitled to a "reasoned" opinion by the Courts, and some may not be denied such an opinion at the whim of the Court.

2. The Court below has rendered a decision in conflict with the decision of other Courts of Appeals on the same matter.

The Court of Appeals, by affirming the trial Court's decision, has ruled that when inadmissible and incomplete evidence is submitted on a motion to dismiss, supporting a defense which does not appear on the face of the complaint, a Court may accept the evidence and dismiss the complaint without notifying the opposing party and allowing an opportunity to respond to the evidence. This ruling is in conflict with the decisions of other Courts of Appeals. *Adams v. Campbell County School District*, 483 F.2d 1351 (10th Cir. 1973); *Dale v. Hahn*, 440 F.2d 633 (2d Cir. 1971); *Huszar v. Cincinnati Chemical Works, Inc.*, 172 F.2d 6 (6th Cir. 1949).

The Court of Appeals, by affirming the trial Court's decision, has ruled that a litigant is collaterally estopped from litigating in Federal Court those issues which were not raised in a prior State criminal case, but which could have been litigated. This ruling is in conflict with other decisions of other Courts of Appeals. *Neaderland v. Commissioner of Internal Revenue*, 424 F.2d 639 (2d Cir. 1970); *Kauffman v. Moss*, 420 F.2d 1270 (3d Cir. 1970).

CONCLUSION

The decision below is erroneous. It denies the Petitioner the equal protection and due process of the laws of the United States. Furthermore, the decision is in direct conflict with the intent of the Federal Rules of Civil Procedure and the other Circuit Courts of Appeals. The present petition for a writ of certiorari should therefore be granted.

Respectfully submitted,

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& PARTRIDGE
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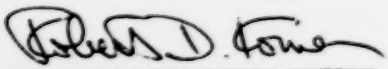
By 
ROBERT D. KORNER
Of Counsel for Petitioner

CERTIFICATE OF SERVICE OF MAIL

I HEREBY CERTIFY that three copies of the foregoing Petition were served upon John S. Lloyd, City Attorney, City of Miami, Florida, 65 S.W. First Street, Miami, Florida 33130, by first class mail, postage prepaid on this 5th day of April, 1976.

ROBERT D. KORNER
Of Counsel for Petitioner